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No. 08-944

IN THE

Supreme Court of the United States

SANDY LATIMER, Individually and as Surviving Spouse of ROY LATIMER, Deceased, *et al.*,

Petitioners,

v.

DONALD JOSEPH LAUGHLIN dba RIVERSIDE RESORT & CASINO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Arizona Court of Appeals' June 24, 2008 Memorandum Decision, which found Respondent's contacts with the forum were not "sufficiently substantial or continuous and systematic" to confer general personal jurisdiction, does not conflict with a decision of this Court, a United States Court of Appeals or any other state court of last resort, and where Petitioners do not claim that the Arizona Court of Appeals' ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Arizona Court of Appeals' June 24, 2008 Memorandum Decision, which found no "causal connection" between Respondent's activity in Arizona and Peitioners' claim in order to support specific personal jurisdiction, does not conflict with a decision of this Court, a United States Court of Appeals or any other state court of last resort, and where Petitioners do not claim that the Arizona Court of Appeals' ruling implicates an important federal question that has not been settled by this Court.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the argument regarding application of the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984) was not raised in the trial court and, therefore, is waived on appeal.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUI REME COURT RULE 29.6

Respondent Donald Joseph Laughlin d/b/a Riverside Resort & Casino does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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JURISDICTION

Arizona courts may exercise personal jurisdiction over a nonresident defendant to the maximum extent permitted by the Arizona and United States Constitutions. Ariz. R. Civ. Pro. 4.2(a). However, when an Arizona court refuses to assert jurisdiction on state law grounds, no federal issue is raised. Only when jurisdiction is asserted, calling into question the extent and reach of the 14th Amendment, does the issue fall in the purview of the federal courts.

Accordingly, Arizona's determination not to assert jurisdiction pursuant to the Arizona Constitution is an adequate, independent determination of state law and does not require the resolution of a federal question. Petitioners have not provided any compelling reasons to deviate from this Court's long-standing policy of respecting state court decisions (*see Michigan v. Long*, 463 U.S. 1032, 1041 (1983)); therefore, jurisdiction should be declined.

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Arizona Court of Appeals' concluding Respondent's contacts with the forum were not "sufficiently substantial or continuous and systematic" to confer general personal jurisdiction conflicts with a decision of this Court, a United States Court of Appeals or any other state court of last resort. *See* Sup. Ct. R. 10(a) – (c). Nor do Petitioners establish

the Arizona Court of Appeals' holding that no "causal connection" existed between Respondent's activity in Arizona and Petitioners' claim in order to support general personal jurisdiction conflicts with a decision of this Court, a United States Court of Appeals or any other state court of last resort. *See id.* Further, Petitioners do not claim that the Arizona Court of Appeals' ruling implicates an important federal question that has not been settled by this Court. *See id.*

While every Petition represents a party's third or fourth "bite at the apple," here, Petitioners have leveled the entire orchard. Petitioners have newly associated counsel who also represented the claimants in two separate border-casino cases petitioned to the Arizona State Supreme Court in late 2008 (both of which were also denied review).[1] However, this is not counsel's first appearance in this matter. Despite involvement with the other border-casino matters, counsel filed an *Amici Curiae* brief with the Arizona Supreme Court in this matter. Now, after review was denied, counsel has associated in for Petitioners.[2]

This point is significant because Petitioners failure to argue for application of the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984) in the trial court,

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1. *Cook v. Avi Casino Enterprise, Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0110, 2008 WL 4108121 (March 28, 2008), *rev. denied*, Oct. 28, 2008, *pet. for writ of cert. filed Jan. 22, 2008*, and *Womack v. KC Arena, Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0127, 2008 WL 3915959 (February 26, 2008), *rev. denied*, Oct. 28, 2008.

2. Mr. Abney has also filed a Petition for Writ of Certiorari in the *Cook* matter.

let alone at any previous appellate level, constitutes waiver on appeal. *See Yakus v. United States*, 321 U.S. 414, 471 (1944). Trial counsel never raised the argument—not before the trial court, not before the court of appeals and not before the state supreme court. The first and only time the argument was mentioned was by newly associated counsel, as *Amicus* counsel, to the Arizona Supreme Court. Counsel's recent association is a poorly veiled attempt to circumvent the anticipated waiver argument and overcome trial counsels' prior failures to raise the issue.

Notwithstanding, Petitioners' continued failure to acknowledge the true nature of the appeal is disingenuous. Petitioners have asked every court before which they have appeared to effectively overrule the opinion in *Williams v. Lakeview Co.*, 199 Ariz. 1, 13 P.3d 280 (2000) ("*Williams II*"). In its place, Petitioners have implored the courts to embrace the *Calder* "effects test." Notably, *Calder* was on the books for 16 years before the Arizona Supreme Court rendered its decision in *Williams II*. None of the arguments or "evidence" submitted by Petitioners supports the overturning of the controlling *nine-year-old* case or the curtailing of due process rights afforded non-resident defendants by the Fourteenth Amendment of the United States Constitution.

Put succinctly, Petitioners have utterly failed to carry their burden of demonstrating any compelling reason for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Background

This matter involves claims for a fatal automobile accident which occurred in the early morning hours of February 21, 2003. While traveling on State Highway 68 in Golden Valley, Arizona, Daniel Brackney ("Brackney") unsuccessfully attempted to pass a passenger van, resulting in a collision. The collision caused the van to lose control and resulted in the deaths of both Roy Latimer and Eric Ruiz.

Decedents' families brought this wrongful death claim against Brackney and the casinos he allegedly visited during the evening of February 20, 2003.[3] Petitioners alleged that, in the late evening hours and early morning hours before the incident, Brackney imbibed alcoholic beverages on the casino's premises to the extent that Brackney became sufficiently impaired and was ultimately unable to operate his vehicle safely. Petitioners further alleged that the casino not only provided Brackney with alcohol, but that it escorted Brackney off the property and put him in his vehicle knowing that he was under the influence. (R. 63, pages 16-18)

Brackney testified that he visited the casino on the evening of February 20, 2003 because there was "[n]othing going on where we were at." (R.104, Exhibit K). Brackney indicated his intent was to visit one of the

3. Another casino, Flamingo-Laughlin, was dismissed by minute entry order on January 14, 2005. (Record Item ("R.") 30).

casinos and then visit a bar in Laughlin. *Id.* Brackney chose this casino as opposed to another casino because it had the "Losers Lounge" and was the first casino past the bridge. *Id.* Brackney did not carry a gaming card because he was not a member of the casino's players club. *Id.*

Throughout the litigation, Respondent contested all of these facts, including whether Brackney ever actually visited the casino on the evening in question. However, for the purposes of the motion to dismiss below, as well as the appeal, the allegations are assumed to be true.

These facts are not in dispute. The accident occurred in Mohave County, Arizona. Brackney and both decedents were Arizona residents. Respondent operates its business in Laughlin, Nevada. Respondent does not operate any businesses in Arizona but does advertise in Arizona and throughout Southern Nevada. The purported provision of alcohol and alleged release of Brackney's vehicle occurred in Nevada.

II. Procedural History

In their February 11, 2004 Complaint, Petitioners asserted a single claim for "tort - motor vehicle" based on negligence. (R. 1). The initial Complaint named only two defendants: Brackney and the Riverside Resort and Casino, Inc. The Complaint was subsequently amended on four separate occasions: April 8, 2004; April 30, 2004; July 22, 2005; and September 25, 2005. (R.s 3, 9, 59, and 63). The last of the amendments added Respondent as a Defendant. (R. 63).

On October 13, 2006, Respondent filed a motion to dismiss for lack of personal jurisdiction. (R. 99). At the February 21, 2007 hearing, following conclusion of oral argument by counsel, Judge Bartlett granted the motion and dismissed Respondent for lack of personal jurisdiction. (R. 118). The superior court's ruling was memorialized in a February 21, 2007 minute entry order. Thereafter, on March 7, 2007, Respondent filed its proposed form of judgment, which included Rule 54(b), Arizona Rules of Civil Procedure, language that it was to be a final judgment. (R. 120). The trial court entered formal and final judgment granting the motion to dismiss on April 25, 2007. (R. 121). Petitioners filed their notices of appeal on May 23, 2007 and May 25, 2007. (R. 124 and 127).

Division One of the Arizona Court of Appeals affirmed the trial court's dismissal for lack of personal jurisdiction. *See* Appendix A to the Petition for Writ of Certiorari, Arizona Court of Appeals' June 24, 2008 Memorandum Decision "Memorandum Decision"). Thereafter, the Arizona Supreme Court denied the Petition for Review. *See* Appendix B to the Petition for Writ of Certiorari, Arizona Supreme Court's October 28, 2008 Order denying Petition for Review.

III. Alleged Contacts With The Forum

Despite Petitioners continued representations to the contrary, the material facts, as related by the Court of Appeals after a detailed examination of the record, demonstrate that most of the forum contacts alleged by Petitioners are not attributable to Respondent. *See* Memorandum Decision at 6, ¶ 11. Rather, the record reveals that Respondent had very few contacts with Arizona. *See id.* at 7, ¶ 12.

Accepting Petitioners' assertions as true, the Court found Respondent to have the following contacts with the forum. Respondent had accounts in Bullhead City, Arizona with JP Morgan Chase Bank, First Union Bank and Bank of America. *See id.* at 7-8, ¶ 12. Respondent leased an airport hangar at the Laughlin-Bullhead International Airport. *See id.* at 8, ¶ 12. Respondent had an Arizona phone number and offered its patrons discounts to unaffiliated businesses located in Arizona. *See id.* at 8, ¶ 13. Petitioners also argued that Respondent built a bridge across the Colorado River and that Respondent offered wedding packages on a boat, with instructions for obtaining an Arizona marriage license on its website. *See id.* at 8, ¶ 13.

The Court of Appeals found the remaining alleged contacts to be either attributable to Riverside, Inc., the previously dismissed defendant (*See id.* at 6, ¶ 11, fn. 2), or undeveloped/unsupported by the record (*See id.* at 8, ¶ 13 nn.3 and 4).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court, a United States Court of Appeals or any other state court of last resort nor does the ruling implicate an important federal question that has not been settled by this Court. Accordingly, Petitioners have not met their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Constitutional Due Process Limits Arizona's Assertion Of Jurisdiction Over Non-Resident Defendants.

Petitioners argue that, in order to facilitate efforts to curb drunk-driving and compensate Arizona plaintiffs, a Nevada business serving alcohol near the Arizona border should simply expect to be subject to jurisdiction in Arizona. This expectation is based on the possibility that at least some customers will be Arizona residents who will cause automobile accidents upon their return to Arizona. In seeking review, Petitioners ask the Court to focus on Arizona's interest in protecting its citizens, concern for compensating Arizona plaintiffs and the foreseeability that an extraterritorial act could cause injury in Arizona.

None of those factors support the exercise of jurisdiction in this matter. The application of personal jurisdiction based on the factors propounded by Petitioners would require this Court to ignore not only its own opinions but also that of the Arizona Supreme Court in *Williams II*. Foreseeability of an extraterritorial act causing injury in the forum state is not sufficient to exercise personal jurisdiction under the due process clause. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1990). Moreover, unilateral activity of those claiming some relationship with the non-resident defendant is, likewise, insufficient to establish contact with the forum. *See Hanson v. Denckla*, 375 U.S. 235, 253 (1958). Further, none of the "evidence" submitted by Petitioners supports the contention that subjecting Nevada businesses to Arizona jurisdiction will significantly curb drunk-driving

in the State of Arizona. Finally, reliance upon purported policy considerations does not justify ignoring a defendant's constitutional due process rights.

In order to uphold those due process rights, the focus in determining whether personal jurisdiction may be asserted against a non-resident is on the defendant's purposeful contacts with the forum state. The due process clause is an instrument of interstate federalism. *See World-Wide Volkswagen*, 444 U.S. at 294. It may divest the forum state of the power to render a valid judgment even where the defendant would suffer minimal or no inconvenience from being forced to litigate before the court of another state, where the foreign state has a strong interest in applying its law to the controversy or where the foreign state is the most convenient location for litigation. *Williams II*, 199 Ariz. at 3, 13 P.3d at 282; *see also World-Wide Volkswagen*, 444 U.S. at 295. The critical focus must be on the relationship between the defendant, the forum and the litigation. *See Hanson*, 375 U.S. at 253. That relationship must be defined by the defendant's contacts with the forum state, not by the defendant's contacts with residents of the forum. *See id.*

Despite Petitioners' attempts to confuse the issue, "the constitutional touchstone remains whether the defendant purposely established 'minimum contacts' in the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Petitioners have not met the burden of establishing a *prima facie* case that Respondent may be haled into court in Arizona. To rule otherwise would offend traditional notions of "fair play and substantial justice." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

II. The Application Of *Williams II* Below Was Appropriate And Correct.

A. Petitioners Abandon Any Attempt To Distinguish This Matter From The Arizona Supreme Court's Decision In *Williams II*.

Notably, the Petition fails to so much as allude to the controlling Arizona authority regarding jurisdiction over border casinos. In fact, Petitioners refusal to mention, cite, or otherwise discuss the *Williams II* decision anywhere in their brief is disingenuous and a disservice to this Court. Petitioners' failure to distinguish *Williams II* creates a void of any compelling reasons to grant review.

Notwithstanding, *Williams II* remains the controlling authority which governs this case. Despite representations to the contrary in the courts below, the appellate court correctly applied Arizona law, including *Williams II*, in determining that Respondent's limited contacts with Arizona did not support the exercise of personal jurisdiction. To hold otherwise would violate Respondent's due process rights. Review is inappropriate and should be denied.

B. Petitioners Have Not Established General Personal Jurisdiction Because Respondent's Contacts With Arizona Are Not Sufficiently Continuous And Systematic.

"A non-resident defendant is subject to general jurisdiction when the defendant's contacts with the forum state are substantial or continuous and systematic enough that the defendant may be haled into

court in the forum, even for claims unrelated to the defendant's contacts with the forum." *Williams II*, 199 Ariz. at 3, 13 P.3d at 282 (*citing Helicopteros Nacionales de Colmiba S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Because general jurisdiction subjects the defendant to suit on virtually any claim, even when the cause of action does not arise out of or relate to the defendant's activities in the forum state, the level of contact required to show general jurisdiction is quite high. *Williams II*, 199 Ariz. at 3, 13 P.3d at 282; *see also Batton v. Tennessee Farmers Mutual Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987) (*citing Helicopteros*, 466 U.S. at 414).

Williams involved a casino located within a few miles of the state border which conducted no business in Arizona, owned no property in Arizona and did not list a telephone number in any Arizona directory. *Williams v. Lakeview*, 195 Ariz. 468, 473, 990 P.2d 669, 674 (App. 1999) ("*Williams I*"). Furthermore, all of the casino's partners were residents of Nevada. *Id.* The *Williams I* court accepted as true plaintiffs' assertions that the casino solicited Arizona residents via regular advertisements in an Arizona newspaper, that a substantial number of the casino's customers were Arizona residents, that the casino employed Arizona residents and that the casino actively solicited Arizona tour bus companies to bring passengers to the casino. *Id.* at 471-72, 990 P.2d at 672-73. The court concluded, however, that these activities were not sufficiently substantial or continuous and systematic to confer general jurisdiction over the casino. *Id.* at 472, 990 P.2d at 673 (*citing Burger King*, 471 U.S. at 475; *also citing Westphal v. Mace*, 671 F. Supp. 665, 667 (D. Ariz. 1987)).

The *Williams II* court specifically quoted and approved *Williams I* with regard to general jurisdiction. The Arizona Supreme Court reasoned that "[t]he level of contact required to show general jurisdiction is quite high." *Williams II*, 199 Ariz. at 3, 13 P.3d at 282. The *Williams II* court cited the court of appeals holding "that [the boarder casino's] contacts with Arizona were not sufficiently continuous and systematic to permit Arizona to exercise general jurisdiction." *Id.* at 3 n.2, 13 P.3d at 282. Further, the court noted that "plaintiffs did not file a cross-petition for review from that holding." *Id.* Therefore, the Arizona court of appeals ruling regarding general jurisdiction in *Williams I*, unchallenged in the Arizona Supreme Court, remains valid and controlling.

Here, Petitioners spend a mere page and a half discussing general personal jurisdiction. Just short of waiving the argument in its entirety, the half-hearted discussion offers nothing for this Court's consideration. Petitioners' allusion to Respondent's alleged contacts with the forum continues to misinterpret and misrepresent the record on appeal as well as the opinions rendered by the courts below. Notwithstanding, these alleged contacts were considered and rejected by the Arizona Court of Appeals.

The appellate court found that Respondent "did not regularly conduct business in Arizona, nor did it have any agents, offices, property, or other physical presence within Arizona." *See* Memorandum Decision at 9, ¶ 14. Respondent's contacts with Arizona were limited in nature and, in terms of quality, merely served as collateral support to its Nevada operation. The *quality*

of the contacts, not the quantity of contact, is determinative in evaluating general jurisdiction. *See Meyers v. Hamilton Corp.*, 143 Ariz. 249, 253, 693 P.2d 904, 908 (1984). Absent continuous and systematic contacts with the forum, general jurisdiction does not exist. Otherwise unsupported by the record, Petitioners' unsubstantiated legal conclusions offer no compelling reasons to grant the Petition.

C. Petitioners Have Not Established Specific Personal Jurisdiction Because Petitioners' Claim Does Not Arise Out Of Or Relate To Respondent's Contact With Arizona.

When a defendant's activities are not so pervasive as to subject it to general jurisdiction, the court may still find specific jurisdiction. To do so, due process requires that three conditions be satisfied: (1) the defendant purposely avails itself of the privilege of conducting business in the forum; (2) the claim arises out of or relates to the contact with the forum; and (3) the exercise of jurisdiction is reasonable. *Williams II*, 199 Ariz. at 3, 13 P.3d at 282; *see also Burger King*, 471 U.S. at 472-76.

The arguments below focused on the second prong of this test, namely whether or not the claim arose out of or related to Respondent's contacts with Arizona. *Helicopteros*, 466 U.S. at 415. In considering whether the claim arose out of the casino's contacts with Arizona, the *Williams II* court cited the "but for" test adopted by the Ninth Circuit. 199 Ariz. at 5, 13 P.3d at 284 (*citing Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *reversed on other grounds*, 499 U.S. 585

(1991)). Applying the "but for" test, "a nexus exists if a plaintiff's injury would not have occurred but for a defendant's forum activities." *Williams II*, 199 Ariz. at 4, 13 P.3d 283. The *Williams II* court held that, because plaintiffs established no nexus between their claim and the casino's activities in Arizona, specific jurisdiction did not exist. 199 Ariz. at 5, 13 P.3d at 284.

Here, the facts are virtually identical to those in *Williams*. Although Brackney was familiar with the casino, there is no evidence in the record showing Respondent's forum contacts caused any of Brackney's actions on the night of the accident. *See* Memorandum Decision at 12, ¶ 18. Petitioners have not and cannot show that Brackney would not have gone to the casino "but for" Respondent's activity in Arizona. *See id.* at 12, ¶ 18. The record supports Respondent's position that the accident was the sole result of Brackney's unilateral activities and in no way related to Respondent's alleged contacts with Arizona. Brackney's unilateral decisions to visit the casino, drink to excess and then drive off drunk do not create jurisdiction.

Such unilateral acts of someone other than the defendant cannot support jurisdiction. *Williams II*, 199 Ariz. at 5, 13 P.3d at 284. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contract with the forum state." *Burger King*, 471 U.S. at 475 (*citing Helicopteros*, 466 U.S. at 417). The unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction. *Burger King*, 471 U.S. at 475.

Moreover, inducement of the visit, in the context of specific jurisdiction, is meaningless because that is not the act out of which the claim arose. If this fact was enough, then all of Respondent's Arizona customers who saw advertising could assert jurisdiction for any act which occurred in Nevada. In effect, the advertising would support general jurisdiction because there would be no nexus between the defendant's contacts and the claim. The alleged marketing and advertisement contacts are not enough to exercise jurisdiction over the casino. *See Williams I*, 195 Ariz. at 471-72, 990 P.2d at 672-73.

Like the shortcomings with regard to general jurisdiction, Petitioners fail to identify a single Arizona contact causally related to the claim, an essential element for asserting specific personal jurisdiction. Petitioners are unable to establish a "causal nexus" between any of Respondent's alleged forum contacts and the claim in order to satisfy the "but for" test adopted and applied by the Arizona Supreme Court in *Williams II*. The failure to show a "causal connection" between Respondent's forum contacts and Brackney's actions that caused Petitioners' claim preclude the exercise of specific jurisdiction. *See* Memorandum Decision at 12, ¶ 18 (*citing Williams II*, 199 Ariz. at 4-5, 13 P.3d at 283-84).

III. The *Calder* "Effects Test" Does Not Support The Exercise Of Personal Jurisdiction Over Respondent.

Instead, Petitioners argue that application of the *Calder* "effects test" is enough to exercise specific jurisdiction. Notably, Petitioners offer no justification whatsoever for abandoning the *Williams II* "but for" test in favor of the inapposite *Calder* standard.

A. Petitioners Waived The *Calder* Argument By Raising It For First Time On Appeal.

The first obstacle to the *Calder* argument is that Petitioners waived it. "[I]ssues cannot be raised on appeal which were not presented in the trial court. *Yakus*, 321 U.S. at 471 (1944). As a general rule, "[o]n appeal . . . an appellant may not advance new theories or raise new issues to secure reversal." *Hourani v. Benson Hosp.*, 211 Ariz. 427 n.2, 122 P.3d 6 (App. 2005) (*citing Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004)); *see also Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 137, ¶ 17, 978 P.2d 110, 114 (App. 1998) ("New arguments may not be raised for the first time on appeal.").

This contention was never raised in the superior court, the court of appeals or the state supreme court. In fact, Petitioners *never* previously asserted the argument. Prior to the filing of the instant Petition, the argument only appeared in an *Amici Curiae* brief to the Arizona Supreme Court. Given that the state supreme court denied review, the *Calder* argument has never been, properly or improperly, considered by any court below.

Furthermore, association of new counsel in the instant appeal does not excuse the waiver. Although newly associated counsel may have raised the issue in the *Cook* and *Womack* cases, such is not imputed to overcome trial counsel's prior and repeated failures to raise the issue here. Accordingly, Petitioner's *Calder* argument was waived, is not properly before this Court, and should not be considered. This waiver, coupled with the scant discussion of general personal jurisdiction, leaves this Court with no compelling reasons to grant the Petition.

B. Notwithstanding, Mere Untargeted Negligence Is Not Grounds For Jurisdiction Under *Calder*.

Petitioners argue that *Calder* supports finding jurisdiction in this case even though Respondent did not commit any act in Arizona relating to the claim. Jurisdiction may properly be exercised in certain situations in which a defendant does not commit an act within the forum state; however, *Calder* only supports finding specific personal jurisdiction if the defendant commits an intentional act that expressly targets the plaintiff within the forum state. Because Respondent neither expressly targeted Petitioners nor knew Petitioners would be impacted, *Calder* does not support the exercise of personal jurisdiction in this case.

In *Calder*, a reporter and editor for the *National Enquirer* wrote an allegedly libelous story about actress Shirley Jones which was penned in Florida. 465 U.S. at 785-86. This Court held that the journalists were subject to specific personal jurisdiction in California. *Id.* at 789-90. The Court reasoned that jurisdiction in California

was proper because the journalists knew that the "devastating impact" of the story would be felt in California as that was where Jones lived and worked and, more importantly, where the tabloid had its largest circulation. *Id.* Even though the reporter and editor did not commit acts within California, the Court held that the exercise of personal jurisdiction did not offend due process because the defendants committed an intentional, allegedly tortuous act expressly aimed at a California resident that they knew would have a potentially devastating impact upon that resident in the forum state. *Id.*

There are no similar circumstances in this case. Petitioners allege, without any support in the record whatsoever, that Respondent knew the intoxicated driver was an Arizona resident and would drive into Arizona. The allegation is one not of an intentional tortuous act via express targeting, but rather exaggerated foreseeability, which has been repeatedly rejected in the jurisdiction analysis. *Williams II*, 199 Ariz. at 6, 13 P.2d at 285 (reasoning that foreseeability does not confer jurisdiction). Overserving a patron who then drives into Arizona cannot confer personal jurisdiction under either *Williams II* or *Calder*.

As noted in *Calder*, the defendants were not charged with "mere untargeted negligence," for which personal jurisdiction could not be exercised, but rather an intentional tortuous act expressly targeting the individual plaintiff in the forum state. *Calder*, 465 U.S. at 789. There is no allegation, and certainly no evidence in the record, that Respondent somehow targeted Petitioners when its employees allegedly overserved

Brackney and allowed him to drive to Arizona. Indeed, Petitioners' Complaint alleges negligence, not an intentional tort. (R. 1). Respondent's acts were not targeted toward Petitioners nor deliberately aimed at Arizona. At best, the alleged acts were nothing more than "mere untargeted negligence."

Regardless, even when supported by the record (which it is not here), a defendant's alleged knowledge that it is dealing with an Arizona resident is not sufficient to support the exercise of personal jurisdiction. The Arizona Supreme Court long ago held that knowledge that an act outside the forum could result in an injury in Arizona to an Arizona resident is not sufficient to support the exercise of personal jurisdiction. *See N. Propane Gas Co. v. Kipps*, 127 Ariz. 522, 527, 622 P.2d 469, 474 (1980). The benchmark for the exercise of personal jurisdiction is contact with the forum, not with residents of the forum. Jurisdiction is proper only if the contacts proximately result from actions by the defendant that create a substantial connection with the forum state. *Burger King*, 471 U.S. at 476.

In applying *Calder*, the Ninth Circuit Court of Appeals also held that knowledge that a foreign act could potentially injure a forum resident is not sufficient for the exercise of personal jurisdiction. *See Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). To meet the *Calder* "effects test," the defendant must have: (1) committed an intentional act; (2) expressly aimed at the forum state; that (3) caused harm, the brunt of which the defendant knows is likely to be suffered in the forum state. *Id.*

When applying *Calder*, courts have recognized that a foreign act with foreseeable effects in the forum state does not give rise to specific personal jurisdiction. *Id.* at 1087. Instead, something more must be required, which the Ninth Circuit concluded to be what this Court described as "express aiming." *Id. (citing Calder*, 465 U.S. at 789). In order to exercise specific personal jurisdiction, the defendant must have engaged in an intentional wrongful act expressly targeted at the plaintiff, whom the defendant knows to be a resident of the forum state. *Bancroft*, 223 F.3d at 1087.

Despite the resulting tragedy, Petitioners have not submitted any proof whatsoever that Respondent intentionally targeted Petitioners when it allegedly overserved Brackney and allowed him to drive home. Respondent's alleged acts were nothing more than "mere untargeted negligence," unsupportive of the exercise of personal jurisdiction under either *Williams II* or *Calder*. To hold otherwise would directly contradict and render meaningless the Arizona Supreme Court's holding in *Williams II* and violate Respondent's due process rights.

CONCLUSION

Petitioners have not presented any compelling reasons for this Court to grant the Petition. Therefore, for the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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